STATE OF MICHIGAN

IN THE SUPREME COURT

DUSTIN ROCK,

Plaintiff-Appellee,

vs.

DR. K. THOMAS CROCKER and
DR. K. THOMAS CROCKER, D.O., P.C.,

Defendants- Appellants.

Supreme Court No. 150719

Court of Appeals No. 312885

Kent Circuit Court
Case No. 10-06307-NM

DEFENDANTS-APPELLANTS' BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING JURISDICTION

This Court has jurisdiction over appeals from decisions of the Court of Appeals. Const 1963, art 6, § 4; MCR 7.301(A)(2). Kent County Circuit Court Judge James Robert Redford entered an Opinion and Order Sustaining Defendants Objections to the Expert Testimony of Plaintiff's Treating Physician, Dr. David Viviano.[1] Plaintiff-appellee timely filed an application for leave to appeal that order, which the Court of Appeals granted. Defendants-Appellants then timely filed a cross-appeal contesting the trial court's ruling on two motions in limine.[2]

On November 18, 2014, the Court of Appeals (Judges Douglas B. Shapiro, William C. Whitbeck, and Cynthia Diane Stephens) issued a published opinion authored by Judge Shapiro.[3] Under MCR 7.302(C)(2), defendants-appellants filed a timely application for leave to appeal. This Court granted the application and directed the parties to address:

> (1) Whether the lower courts erred in concluding that allegations relating to violations of the standard of care that the plaintiff's expert admitted did not cause the plaintiff's injury were admissible as evidence of negligence; and
>
> (2) Whether the Court of Appeals erred in holding that, if the defendant is a board-certified specialist, MCL 600.2169(1) only requires an expert to be board certified in that same specialty at the time of the malpractice, and not at the time of trial. [*Rock v Crocker*, 863 NW2d 330 (Mich 2015).]

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[1] Appx 102a-105a, Opinion and Order Sustaining Defendants Objections to the Expert Testimony of Plaintiff's Treating Physician, Dr. David Viviano ("Opinion re: Expert").
[2] Appx 106a-109a**,** Order regarding motions in limine.
[3] Appx 110a-120a, Court of Appeals Opinion.

STATEMENT OF QUESTIONS PRESENTED

I.

Rock and his expert *admit* that there was *no* causal link between two alleged acts of malpractice and Rock's claimed injuries. Yet the lower courts concluded that the jury could still consider testimony on those meritless claims. Is testimony regarding a meritless claim admissible as evidence of negligence?

The trial court answered, "yes," and denied defendants' motion in limine.

The Court of Appeals answered, "yes" in a published opinion, holding that expert testimony on meritless claims "may be relevant to the jury's understanding of the case" and the evidence "is relevant to [Dr. Crocker's] competency in treating this injury."

Plaintiff answers, "yes."

Defendants submit that the correct answer is "no."

II.

MCL 600.2169(1)(a) requires that a proposed standard-of-care medical-malpractice expert testifying against a board-certified specialist "must *be* a specialist who *is* board certified in the same specialty." One of Rock's standard-of-care experts, Dr. Viviano, is not currently board-certified because he allowed his certification to lapse. Is Dr. Viviano barred under MCL 600.2169(1)(a) from giving standard-of-care testimony because the statute requires him to be board certified at the time of trial?

The trial court answered "yes."

The Court of Appeals answered, "no," holding that "is" means "was" and that a testifying expert only needs to "have been board certified in the same specialty at the time of the occurrence that is the basis for the action."

Plaintiff answers, "no."

Defendants submit that the correct answer is "yes."

STATEMENT OF FACTS

A. Dr. Crocker performed surgery on Rock's ankle after he was injured while fixing a truck.

In September 2008, Rock suffered a trimalleolar fracture—a fracture of the lateral malleolus, medial malleolus, and posterior malleolus—of his right ankle while changing brake pads on a truck.[4] Two days later, Dr. Crocker performed surgery on Rock's ankle, which included inserting a plate and screws.[5] In October 2008, Rock had a post-operative appointment with Dr. Crocker. Rock claims that Dr. Crocker told him that he could start bearing weight on his ankle at that appointment.[6] But he admits that he didn't start doing so until after he moved across the state and began treating with Dr. Viviano.[7]

B. Rock alleges that Dr. Crocker committed medical malpractice during his surgery and post-operative care.

In June 2010, Rock filed this action, claiming that Dr. Crocker committed medical malpractice with respect to the surgery and his post-operative care. The parties conducted discovery and the matter was nearing trial when the trial court decided two motions pertinent to this appeal.[8]

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[4] Appx 14a, Complaint, ¶4; Appx 118a, Court of Appeals Opinion, p. 9.

[5] Appx 29a, Rock Dep., p. 107; Appx 14a, Complaint, ¶5; Appx 19a, Affidavit of Merit, ¶6; Appx 110a, Appx 117a, Court of Appeals Opinion, pp. 1, 7.

[6] Actually, Dr. Crocker only told Rock that he could touch his toe to the ground for balance during activities like brushing his teeth. Appx 33a, Dr. Crocker Dep., p. 53. But the dispute on that point is immaterial.

[7] Appx 28a, Rock Dep., p. 101-102; Appx 37a, Viviano Trial Testimony, p. 12.

[8] The trial court decided a third motion that concerned evidence of collateral-source payments, which was also addressed in the Court of Appeals' opinion. But this Court didn't grant leave to appeal on that issue, so it isn't addressed in this brief.

1. Dr. Crocker's motion regarding causation

Dr. Crocker moved to bar Rock from pursuing his claims on two alleged breaches of the standard of care because his expert admitted that those alleged breaches didn't cause any damages.[9] Rock's orthopedic-surgery expert, Dr. Antoni Goral, provided an affidavit of merit asserting that Dr. Crocker prematurely allowed Rock to bear weight on his right leg after the October 2008 post-operative appointment.[10] He also claimed that Dr. Crocker did not use enough screws or the right length plate, and that the plate and screws were not properly placed to fixate the fracture of the lateral malleolus.[11] But, during his deposition, Dr. Goral testified that neither of those alleged errors caused Rock's injury.

Dr. Goral testified that, even if Dr. Crocker told Rock that he could put weight on his right foot, there was no evidence that it caused any of Rock's injuries:

> Q. …. You'll agree with me that **there isn't any evidence** at this time, based on what you reviewed, to show that as a result of allowing the patient to bear weight, that the patient suffered further trauma and injury to the area that itself necessitated an additional surgical procedure?
>
> A. No. The reason for the secondary surgical procedure was based upon what's contained in number five [a different allegation regarding the standard of care].
>
> Q. **In other words, what I said is correct?**
>
> A. **Correct**.[12]

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[9] Appx 77a-86a, Dr. Crocker's Motion in Limine to Strike Two Allegations of Malpractice for Lack of Causation.
[10] Appx 18a-19a, Affidavit of merit, ¶ 5.
[11] Appx 19a, Affidavit of merit, ¶ 6.
[12] Appx 22a-23a, Dr. Goral Dep., pp. 48-49 (emphasis added).

In fact, Rock confirmed that he didn't put weight on his right foot after the October 2008 visit.[13]

And though Dr. Goral criticized the placement of the plate and screws, he agreed that this alleged breach "did not cause harm" because the fracture healed properly:

> Q. … So although it's your belief that the placement of the fibular plate, the number of screws used did not meet the standard, you believe that it **did not cause harm** in this case because the fracture [of the lateral malleolus] united?
>
> A. **Correct**.[14]

Consistent with that testimony, Dr. Goral also admitted that there was no change in the position of any of the fractured bones between Rock's last visit with Dr. Crocker and his first visit with Dr. Viviano.[15]

Dr. Crocker moved to strike evidence regarding these two alleged breaches of the standard of care because there was no causal connection between them and any alleged injury. Rock's response admitted that the two allegations weren't linked to any harm.[16] Yet he argued that the evidence should be admitted anyway because "it goes to his knowledge and skill in performing the repair of this type of fracture."[17]

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[13] Appx 28a, Rock Dep., pp. 101, 102 (testifying the he "made it a habit not to put weight on [his] foot between the time [he] saw Dr. Crocker for the last time and the time [he] saw Dr. Viviano for the first time").

[14] Appx 24a, Dr. Goral Dep., p. 59-60 (emphasis added).

[15] Appx 22a, Dr. Goral Dep., p. 47.

[16] Appx 87a, Rock Answer to Causation Motion, ¶ 2 ("Plaintiff's retained expert Dr. Goral did state that two of the breaches of the standard of care had not caused any damages or injuries …."); *Id.*, p. 3 ("Even though it did not cause any damage ….")

[17] *Id.*

The trial court agreed with Rock and denied Dr. Crocker's motion. Without acknowledging Dr. Goral's agreement on lack of causation,[18] the trial court stated that Rock's expert would testify that "the treatment provided by the defendant to the plaintiff fell below the standard of care."[19] It then reasoned that testimony on the weight-bearing and screw-and-plate-placement claims was admissible because the jury should "review in its entirety the quality of treatment provided by the defendant":

> It is certainly reasonable for a reasonable finder of fact to examine all the claims of the plaintiff and if satisfied that in addition to the difficulties of treatment that actually caused injuries if they believe the Defendant Doctor also breached the standard of care in a variety of multiple other ways then it provides evidence which is relevant because it makes it a question of fact more likely than not, that is, that the doctor did not perform his duties as is required by the standard of care and that the injuries he did suffer were a result of his breaches and that the claims of the plaintiff are meritorious and should be compensated.[20]

The court also stated that the weight-bearing and screw-and-plate-placement claims were "part of the *res gestae* of the claims before the Court."[21]

After the Court of Appeals granted Rock's application for leave to appeal on a different issue (addressed below), Dr. Crocker filed a cross-appeal raising this issue. Dr. Crocker explained that his motion, which raised a merits-based defect in two of Rock's claims, was the equivalent of a motion for summary disposition—causation, of

[18] The court instead characterized this as merely being defendants' argument.
[19] Appx 106a-107a, Order regarding motions in limine, pp. 1-2.
[20] *Id.*, p. 2.
[21] *Id.*, p. 3.

course, being a necessary element of every malpractice claim.[22] So Rock's agreement that the weight-bearing and screw-and-plate-placement claims were causatively disconnected from damage eliminated any basis to put them before the jury.

The Court of Appeals agreed that the trial court erred in failing to clearly order that Rock "may not seek damages for those violations."[23] Yet the panel quickly took away what it had given. The panel stated that "evidence of a course of defendant's violations of the standard of care, even if the violations did not directly cause plaintiff's eventual injury may be relevant to the jury's understanding of the case."[24] In a footnote, the panel added that Rock must prove that Dr. Crocker was negligent and that the evidence "is relevant to [Dr. Crocker's] competency in treating this injury."[25] The panel stated that the trial court could "reconsider defendant's request to exclude evidence" of the weight-bearing and screw-and-plate-placement claims on remand.[26] But the trial court has already stated a view consistent with the panel's analysis of the relevance of the testimony on those claims.[27]

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[22] Crocker Court of Appeals Brief, pp. 31-33; Crocker Court of Appeals Reply Brief, p. 2.

[23] Appx 118a, Court of Appeals Opinion, p. 9.

[24] Appx 118a, 120a, Court of Appeals Opinion, pp. 9, 11.

[25] Appx 118a, Court of Appeals Opinion , p. 9 n 8.

[26] Appx 120a, Court of Appeals Opinion, p. 11.

[27] Appx 107a, Order regarding motions in limine, p. 2 (stating that the jury should "review in its entirety the quality of treatment provided by the defendant" and that "if [the jurors] believe [Dr. Crocker] also breached the standard of care in a variety of multiple other ways then it provides evidence which is relevant"); Appx 117a, Court of Appeals Opinion, p. 8; see also *id.*, p. 9 n 8 ("[A]s the trial court noted, ….").

2. Dr. Crocker's motion to preclude Dr. Viviano from offering expert testimony

Rock identified Dr. Viviano, who treated Rock, as one of his standard-of care experts (Dr. Goral is the other).[28] Dr. Crocker moved to exclude Dr. Viviano's expert testimony because he didn't meet the requirements of MCL 600.2169(1)(a), which states that "if the party against whom or on whose behalf the testimony is offered, the expert witness must be a specialist who is board certified in that specialty." Dr. Crocker is a board-certified orthopedic surgeon.[29] Though Dr. Viviano was board certified from 2001 through 2011,[30] his board certification has expired. Trial was scheduled for October 1, 2012 and, as of September 27, 2012 when Dr. Crocker moved to exclude Dr. Viviano's testimony, he hadn't been recertified.[31]

The trial court agreed with Dr. Crocker's position and excluded Dr. Viviano from testifying. In a written opinion, the court agreed that the statute requires a standard-of-care expert to be board certified when he testifies:

> The Court finds this statute to be clear on its face that if the party against whom the testimony is offered is a board certified specialist, then the expert witness must "be" a specialist who "is" board certified in that specialty. The statutory language is in the present tense, indicating that the Legislature intended that an expert must be board certified at the time the testimony is given. This is supported in the case law interpreting this statute. In *Halloran* [*v Bhan*, 470 Mich 572; 683 NW2d 129 (2004)], the Michigan Supreme

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[28] Appx 103a, Opinion re: Expert, 2.
[29] *Id.*, p. 1, ¶1.
[30] *Id.*, p. 2, ¶¶2-4.
[31] *Id.*, p. 2, ¶4. See Appx 1a, Register of Actions, p. 1; Appx 95a-101a, Dr. Crocker's Memorandum of Law to Strike Expert Testimony. Dr. Viviano is still not board-certified. See https://www.abos.org/find-a-certified-orthopaedic-surgeon.aspx, accessed July 28, 2015.

> Court held that MCL 600.2169(1)(a) requires a proposed expert witness to "have" the same board certification as the party against whom or on whose behalf the testimony is offered. *Halloran, supra* at 574.[32]

Accordingly, the trial court concluded that "the plain language of MCL 600.2169(1) (a) precludes Dr. Viviano from offering any testimony regarding the applicable standard of practice or care."[33]

Rock filed an application for leave to appeal that ruling, which the Court of Appeals granted. The panel's opinion, authored by Judge Shapiro, doesn't start with the statutory text. It starts with a discussion of what a plaintiff must establish and the observation that "decision-making must be judged against the standard of care that applied when [the defendant] acted"[34] (which no one disputes). When it turned to the expert-witness statute, the panel focused on a provision concerning doctors who specialize, not those who are board certified.[35] When it reached the board-certification requirement, the panel described it as providing that "[i]f the defendant is board certified in a specialty, then the testifying expert must **have been** board certified in the same specialty."[36] (The statute says "must be").

According to the panel, verb tense was unimportant because "the first sentence of MCL 600.2169(1)(a) … employs the same present-tense verbs yet plainly refers to a

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[32] *Id.*, p. 3.
[33] *Id.*, p. 3.
[34] *Id.*, p. 2.
[35] Appx 111a, Court of Appeals Opinion, p. 2 ("Consistent with this principle, a physician who testifies to the standard of care at issue must have possessed, on the date of the alleged malpractice, the same relevant specialty qualifications as the defendant.").
[36] *Id.*, pp. 3-4.

past time period."[37] While it's true that the first sentence plainly refers to the past, that's because it contains the phrase "at the time of the occurrence." So, as the Court of Appeals observed, "despite employing the word 'is,' i.e., the present tense form of the verb 'to be,' the first sentence still requires that the time at which the expert witness must so specialize is at a time in the past in relation to trial …." But the sentence addressing board-certifications doesn't contain the phrase "at the time of the occurrence." The panel got past that omission only with the help of an ellipsis:

> Removing the clauses related to the defendant, and considering only those relevant to the testifying expert, the statute reads:
>
> > In an action alleging malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
> >
> > (a) ... specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered .... [or] the expert witness must be a specialist who is board certified in that specialty.[38]

The panel provided an alternative revision: "the statute requires that a testifying expert must 'specialize[] at the time of the occurrence that is the basis for the action in the same specialty … [and be] board certified in that specialty.'"[39]

Having re-written the statute, the panel concluded that its interpretation reconciled with this Court's description of the board-certification requirement as an

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[37] *Id.*, p. 4.
[38] *Id.*, p. 4, quoting MCL 600.2169(1) (edit in original).
[39] *Id.*, p. 4, quoting MCL 600.2169(1) (edit in original).

"additional" requirement and a legislative amendment that "remove[d] an 'either/or' determination from the statute."[40]

Accordingly, despite the fact that MCL 600.2169(1)(a) requires experts testifying against board-certified doctors to "be a specialist who **is** board certified in that specialty," the Court of Appeals held the expert "must **have been** board certified in the same specialty at the time of the occurrence that is the basis for the action."[41]

ARGUMENT I: Rock and his expert admit that there was no causal link between two alleged acts of malpractice and his claimed injuries. Yet the lower courts concluded that the jury could still consider expert testimony on those meritless claims. The lower courts should have barred testimony on those claims because it is not admissible as evidence of negligence.

This Court's order granting leave directed the parties to address "whether the lower courts erred in concluding that allegations relating to violations of the standard of care that the plaintiff's expert admitted did not cause the plaintiff's injury were admissible as evidence of negligence." *Rock v Crocker*, 863 NW2d 330 (Mich 2015). The answer to that question is an unequivocal, "yes." Because there is no link between the alleged violations and Rock's injury, they are irrelevant and must be excluded from trial.

A. Standard of Review

"[D]ecisions regarding the admission of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence." *People v Lukity,* 460 Mich 484, 488; 596 NW2d 607 (1999). "[W]hen such

[40] *Id.*, p. 5, quoting *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004) and 1993 PA 78.
[41] *Id.*, p. 7.

preliminary questions of law are at issue, it must be borne in mind that it is an abuse of discretion to admit evidence that is inadmissible as a matter of law." *Id.*; *Craig ex rel Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004) ("A court necessarily abuses its discretion when it admits evidence that is inadmissible as a matter of law.").

B. Rock's weight-bearing and screw-and-plate placement claims fail as a matter of law and are irrelevant because of the admitted lack of a causal link between these alleged acts and Rock's claimed damages.

The Court of Appeals got this issue half right. But the part that it got wrong has far-reaching consequences that require reversal.

"Under Michigan medical malpractice law, as part of its prima facie case, a plaintiff must prove that the defendant's negligence proximately caused the plaintiff's injuries." *Weymers v Khera*, 454 Mich 639, 647; 563 NW2d 647 (1997); see MCL 600.2912a(1)(b). Rock admitted and doesn't dispute that he can't establish causation for his weight-bearing and screw-and-plate placement claims. Accordingly, Dr. Crocker explained to the Court of Appeals that those claims failed as a matter of law and that his motion to strike them was the legal equivalent of a summary-disposition motion.[42] The Court of Appeals agreed, stating that it was "effectively a request for partial summary disposition" and that "plaintiff may not seek damages for those violations …."[43] The Court of Appeals got that part right.

The next step follows naturally from the first: if Rock can't seek damages for his weight-bearing and screw-and-plate-placement claims, then all standard-of-care opinions on those claims are irrelevant testimony about dead claims and shouldn't be admitted. Yet

[42] Crocker Court of Appeals Brief, pp. 36-39; Crocker Court of Appeals Reply Brief, p. 2.
[43] Appx 117a, Court of Appeals Opinion, p. 8.

the Court of Appeals attempted to salvage the weight-bearing and screw-and-plate-placement allegations from the scrap heap. It stated that evidence on legally meritless claims is potentially admissible because "evidence of a course of defendant's violations of the standard of care, even if the violations did not directly cause plaintiff's eventual injury may be relevant to the jury's understanding of the case."[44] The panel took a remarkably and improperly broad view of what is at issue in a medical-malpractice case. It stated that a non-injurious violation of the standard of care "is relevant to [the defendant's] competency in treating" the plaintiff.[45] Its ruling defies logic and over 100 years of evidence law.

First, there is no authority that endorses the admission of evidence on a meritless claim. Rock didn't cite any authority endorsing the admission of evidence on a meritless claim in the trial court. He didn't cite any authority for it in his cross-appeal brief. And the panel didn't cite any authority for it. In fact, if the weight-bearing and screw-and-plate-placement claims were Rock's only claims, he wouldn't be able to present evidence supporting those claims to a jury because the case would be over.

Second, for over 100 years, the rule in Michigan has been that "evidence that a person has done an act at a particular time is not admissible to prove that he has done a similar act at another time." *Stranahan v Genesee Co Farmers' Mut Fire Ins Co*, 242 Mich 413, 415; 218 NW 688 (1928); see *People v Flynn*, 93 Mich App 713, 717; 287 NW2d 329 (1979) ("[E]vidence of other unrelated crimes or bad acts by the accused is inadmissible

[44] Appx 118a, Court of Appeals Opinion, p. 9.
[45] *Id.*, p. 9 n 8.

to show that he is guilty of the crime charged"), citing *People v Doud*, 223 Mich 120; 193 NW 884 (1923); *People v Rice*, 206 Mich 644; 173 NW 495 (1919); *People v Coston*, 187 Mich 538; 153 NW 831 (1915). Though often applied in criminal cases and now codified in MRE 404(b), the rule isn't confined to criminal cases and it stands as a rule of relevance and unfair prejudice. See *Lewis v LeGrow*, 258 Mich App 175, 207; 670 NW2d 675 (2003). In *Linn v Gilman*, 46 Mich 628, 633; 10 NW 46 (1881), this Court explained that if "collateral facts" concerning other acts "are incapable of affording any reasonable presumption or inference as to the final subject, they ought not to be admitted" because "they are likely to lead to multiplication of issues and to cause confusion and misjudgment." And in *Altman v Fowler*, 70 Mich 57, 60-61; 37 NW 708 (1888), this Court instructed that testimony regarding similar transactions was inadmissible because it "had no tendency to prove" any fact at issue. In other words, other-acts evidence is inadmissible because:

> (1) It typically isn't relevant, i.e., it doesn't tend to make any fact of consequence more or less probable, MRE 401 and 402, and
>
> (2) It's unfairly prejudicial or confusing and misleading for the jury, MRE 403.

In *Boyd v Wynadotte*, 402 Mich 98, 104-105; 260 NW2d 439 (1977), this Court affirmatively stated that evidence of an alleged breach that didn't cause any harm has "no bearing on whether defendants were negligent." There, the plaintiff sued a city for medical malpractice arising from treatment he received at a city-owned hospital. This Court granted the plaintiff a new trial because the defendant improperly impeached him with his criminal conviction. But it also rejected the plaintiff's argument to amend

his complaint to add a negligent record-keeping theory. The new theory couldn't be linked to his injury, so it was "not a ground for recovery":

> We agree with the defendants that the theory proffered[,] the failure of defendants to keep adequate records and notations of Boyd's treatment and care was "an additional departure from the standard of practice[,]" is not a ground for recovery under the circumstances of this case. [*Id.* at 104.]

Boyd held that the negligent record-keeping theory "would have no bearing on whether defendants were negligent." *Id.* at 104-105. It stressed that the plaintiff's "physical condition cannot be attributed to the alleged failure of the treating physicians to keep adequate records." *Id.* at 105. In other words, because there was no causal link between the alleged negligence and damages, the plaintiff was not going to be permitted to assert that the defendants were negligent based on allegedly deficient charting.

The Court of Appeals opinion in *Wlosinski v Cohn*, 269 Mich App 303; 713 NW2d 16 (2005) also illustrates the point. There, the plaintiff's son died after the defendant performed an unsuccessful kidney transplant. The complaint raised several medical-malpractice theories, including that the defendant mistreated a post-operative blood clot, prescribed the wrong medication, and failed to obtain the decedent's informed consent. The informed-consent claim was based, in part, on "a discrepancy between the personal success rate [for kidney transplants] Dr. Cohn reported to her and his actual success rate." *Id.* at 306. The Court of Appeals reversed a jury verdict in the plaintiff's favor. It held that the informed-consent claim failed because the plaintiff was informed of the risks of the procedure. The statistical discrepancy was irrelevant because there was no "hint of a

relationship between Dr. Cohn's previous failed transplants and the failure of the decedent's new kidney." *Id.* at 310. The plaintiff "paraded the statistics before the jury to show that Dr. Cohn had a propensity to botch transplants." *Id.* at 312. But "[p]ropensity evidence is barred because it diverts a jury' attention from the facts of the case being tried and focuses it on the probability that the defendant, who has made so many mistakes before, made one again." *Id.* So the trial court erred because it "allowed the jury to conclude that Dr. Cohn had a proclivity to fail." *Id.* at 311.

The evidentiary use that the Court of Appeals endorsed in this case is also akin to admitting evidence that a defendant physician was sued for malpractice in the past—something that Michigan courts don't permit. For example, this Court affirmed a trial court's refusal to permit the plaintiff to ask the defendant physician about prior medical malpractice lawsuits in *Persichini v William Beaumont Hosp*, 238 Mich App 626, 632; 607 NW2d 100 (1999); see also *Heshelman v Lombardi*, 183 Mich App 72, 84-85; 454 NW2d 603 (1990); *Wischmeyer v Schantz*, 449 Mich 469, 482; 536 NW2d 760 (1995) ("[T]he mere fact that an expert may have been named in an unrelated medical malpractice action is not probative of his truthfulness under MRE 608 or relevant to his competency or knowledge.").

Courts in other jurisdictions have applied these same principles in analogous cases. For example, in *Cerniglia v French*, 816 So2d 319 (La App 2002), the court reversed a jury verdict against a doctor who performed surgery on the plaintiff. The trial court admitted testimony from two other patients who suffered similar complications from the same surgery. The plaintiffs argued that the testimony was relevant to show the

defendant's lack of knowledge or skill. But the experts testified that the complication could occur without any negligence, so the other patients' testimony was "neither proof of medical malpractice, nor proof that the physician lacked necessary knowledge or skill." *Id.* at 323. Accordingly, the Court held that the testimony wasn't relevant under Louisiana's versions of MRE 401 and MRE 402. *Id.* at 324; see La Code Evid art 401, 402. The Court added that the testimony failed the balancing test under Louisiana's version of MRE 403. *Id.* at 324, quoting La Code Evid art 403. The witnesses couldn't testify that their complications were "caused by negligence on the part of Dr. French," i.e., there was no causal link. *Id.* at 324. So the jury was "allowed to draw the improper inference that Dr. French lacked the proper training, knowledge, and skill to perform the surgery in question." *Id.* at 324. The Court analogized the testimony to evidence of a prior arrest:

> Evidence of prior arrests is inadmissible in criminal trials to prevent the jury from concluding that the defendant has a propensity for committing crimes; in this case, **the similar acts evidence should have been excluded to prevent the jury from concluding that Dr. French has a propensity to commit medical malpractice**. [*Id.* (emphasis added)]

See also *Jones v Tranisi*, 212 Neb 843, 845-846; 326 NW2d 190 (1982) (affirming exclusion of testimony from another patient because, "[i]f the plaintiff was offering Mrs. Vecchio's testimony to prove Tranisi's negligence in performing the operation on the plaintiff, it was not relevant for that purpose"); *Laughridge v Moss*, 163 Ga App 427, 428; 294 SE2d 672 (1982) (affirming exclusion of "alleged previous act of medical malpractice" because "[t]he general rule in a suit for negligence is that evidence of similar acts or omissions on other and different occasions is not admissible" (citation omitted)).

The Court of Appeals' suggestion that Rock's screw-and-plate-placement and weight-bearing claims "may be relevant" to Dr. Croker's "competency in treating this injury" runs afoul of the prohibition on propensity evidence. As *Wlosinski* observed, plaintiffs would always "parade" any and all potential errors "before the jury to show that [the defendant] had a propensity to botch" their treatment. 269 Mich App at 312. But courts have settled on the rule that "[p]ropensity evidence is barred" because it forces the defendant to defend a claim that isn't at issue and needlessly distracts or confuses the jury about the claim that is at issue. *Id.*; see *Coston*, 187 Mich at 545 (holding that admission of other acts testimony was "erroneous and highly prejudicial" because "it proved the defendant guilty of a distinct and independent crime with which he was not charged in the information").

The panel's suggestion that evidence of "violations of the standard of care" that didn't cause injury is admissible as evidence of "negligence" for the claim at issue is a fallacy. Rock admits that Dr. Crocker's placement of the screws and plate and his advice concerning weight bearing didn't cause Rock's alleged injury. That means that those claims have no place in the causal chain. They didn't cause the injury and they didn't cause another error that led to the injury.

Consider a different context. If a lawyer doesn't file a proof of service, that doesn't mean that he failed to raise the right arguments in his brief. Or if a judge admits irrelevant evidence, that doesn't mean that his jury instructions were erroneous. One mistake (or even a series of mistakes) does not mean that another mistake occurred. See *Jones*, 212 Neb at 846 ("One cannot prove that one was negligent in causing an accident

in 1980 because one was negligent in causing one on some earlier occasion."). Indeed, in the context of predicting an employee's behavior, this Court held that "improper behavior of a given type is not an inevitable predictor of other types of improper behavior …." *Elezovic v Ford Motor Co*, 472 Mich 408, 430; 697 NW2d 851 (2005).

Rock's proposed use of the screw-and-plate-placement and weight-bearing claims is also analogous to the use of a statutory violation as evidence of negligence. A statutory violation may be used to establish negligence only if "the evidence will support a finding that the violation was a proximate contributing cause of the occurrence." *Klanseck v Anderson Sales & Serv, Inc*, 426 Mich 78, 87; 393 NW2d 356 (1986).

In *Klanseck*, this Court considered whether evidence that a motorcyclist failed to secure a motorcycle endorsement on his license, as required by statute, was relevant to his comparative fault in failing to properly handle a tire blowout. While violation of a safety statute "may be used as evidence of negligence," this Court "caution[ed] that relevance must be specifically established" before the violation is admissible. *Id.* at 87. The "question facing the court" in *Klanseck* was "whether plaintiff's lack of a motorcycle endorsement could be found to have a causal connection and was therefore relevant to the matters at issue." *Id.* at 89. Applicants for a motorcycle endorsement must pass a written exam and a driving test of their competencies. *Klanseck* held that the plaintiff's violation of the motorcycle-endorsement statute was relevant "under the unique facts" of the case, which included a defense theory and expert testimony that the plaintiff could have avoided the accident if he had handled his bike competently when he first felt the effect of loss of air in the front tire. *Id*.

Klansek used a hypothetical to explain that statutory violations that aren't causally related to the injury are irrelevant:

> [F]or example, **if the plaintiff were shown to have been driving a motorcycle unequipped with a headlight in violation of a statute, such violation would be irrelevant in litigation involving a single vehicle accident in daylight** in which plaintiff's ability to see or be seen was not at issue. In such a case, a court might hold, under the third factor listed above, that a driver's violation of the headlight statute could not have been a proximate cause of the accident. In short, **the statutory violation would be irrelevant to the facts of the case**. [*Id.* (emphasis added).]

See, e.g., *Haynes v Seiler*, 16 Mich App 98, 101-102; 167 NW2d 819 (1969) (holding that plaintiff's violation of assured-clear-distance-ahead statute was irrelevant when defendant's vehicle struck the plaintiff's vehicle from behind).

Rock's screw-and-plate-placement and weight-bearing claims are analogous to the headlight-violation example given in *Klansek*. Rock's expert, Dr. Goral, agreed that those alleged violations of the standard of care have no connection to Rock's injury, i.e., a medial-malleolus fracture that wasn't properly aligned and fixated. Dr. Goral's criticisms of number of screws, length of the plate, and placement of the screws and plate only related to Rock's lateral-malleolus fracture, which Dr. Goral agreed "united" despite his criticisms of Dr. Crocker's surgery.[46] And there is no evidence that Rock suffered any trauma from putting weight on his foot (assuming, for argument's sake, that Dr. Crocker told him that he could bear weight).[47] So the screw-and-plate-placement and weight-bearing allegations have no bearing on Rock's remaining claim

[46] Appx 19a, Affidavit of merit, ¶ 6; Appx 24a, Dr. Goral Dep., pp. 59-60.
[47] Appx 18a, Affidavit of merit, ¶ 5; Appx 22a-23a, Dr. Goral Dep., pp. 48-49.

that Dr. Crocker didn't properly align and fixate the medial-malleolus fracture. Or, in *Klanseck*'s statutory-violation parlance, no "evidence will support a finding that the violation was a proximate contributing cause of the occurrence." 426 Mich at 87. So, like a statutory violation that is disconnected from the plaintiff's injury, Rock's screw-and-plate-placement and weight-bearing allegations are disconnected from the injury are not relevant.

The trial court's reference to *res gestae* doesn't fare any better than the Court of Appeals' rationale.[48] The vast majority of the cases dealing with the concept of *res gestae* are criminal cases. In fact, over the past 15 years, no appellate court in this state has discussed *res gestea* in a civil case. And nearly 50 years ago, the Court of Appeals cautioned against becoming mired in "the evidentiary swamp into which a pursuit of the *res gestae* can lead us …." *Rice v Jackson*, 1 Mich App 105, 110; 134 NW2d 366 (1965). *Rice* described res gestae as "on its way to the legal graveyard" not to be "pursued like a phantom." *Id.* at 117. Indeed, *Rice*'s *res gestea* analysis became moot when Michigan codified its rules of evidence in 1978, specifically the excited utterance exception for hearsay in MRE 803(2).

Even if *res gestea* were considered a viable concept for civil cases, it doesn't permit Rock to use his screw-and-plate-placement and weight-bearing claims at trial. *Res gestae* is defined as "'**the facts** which form the environment of a litigated issue; the things or matters accompanying and incident to a transaction or event.'" *Case v Vearrindy*, 339 Mich 579, 584; 64 NW2d 670 (1954), quoting Webster's New International

[48] Appx 108a, Order regarding motions in limine, p. 3.

Dictionary (2d ed.). "*Res gestae* statements are declarations growing out of the main fact—the litigated issue—**and contemporaneous** with it." *Id.* (emphasis added). Statements "not contemporaneous with … and … not spontaneously evoked" by a "main fact" are not properly considered res gestae. *Id.*

Dr. Goral's opinions aren't contemporaneous with Rock's treatment, nor are they "spontaneously evoked." In fact, they aren't even statements of fact—they are his **opinions**, given not spontaneously, but at Rock's behest. Under MCL 600.2164(3), an expert witness does not testify "to the established facts, or deductions of science, nor to any other specific facts," but instead testifies about "matters of opinion." *Guerrero v Smith*, 280 Mich App 647, 672; 761 NW2d 723 (2008). Standard-of-care opinion testimony from Dr. Goral, then, is nothing at all like *res gestae*.

The Court of Appeals' vague suggestion that the trial court could "consider what limiting jury instruction to give" is also not a solution.[49] No instruction could cure the error in admitting the evidence because there is no proper use for it. Even if a jury was told that it couldn't award damages for the weight-bearing and screw-and-plate-placement claims, it is still error to allow the jury to use evidence on those claims to infer that Dr. Crocker committed some other negligent act.

The Court of Appeals' ruling that the screw-and-plate-placement and weight-bearing claims "is relevant" to a doctor's "competency" has far reaching implications. It's wrong in so many ways that this Court must reverse it. The rule should be the same as it has always been: "[E]vidence that a person has done an act at a particular time is

[49] Appx 118a, Court of Appeals Opinion, p. 9.

not admissible to prove that he has done a similar act at another time." *Stranahan*, 242 Mich at 415.

ARGUMENT II: MCL 600.2169(1)(a) requires that a proposed standard-of-care medical-malpractice expert testifying against a board-certified specialist "must *be* a specialist who *is* board certified in the same specialty." It is undisputed that Dr. Viviano is not currently board-certified because he allowed his certification to lapse. Because the statute requires the expert to be board certified at the time of trial, the trial court properly precluded him from offering standard-of-care testimony.

This Court directed the parties to address "whether the Court of Appeals erred in holding that, if the defendant is a board-certified specialist, MCL 600.2169(1)(a) only requires an expert to be board certified in that same specialty at the time of the malpractice, and not at the time of trial." *Rock*, 863 NW2d at 330. Again, the answer is an unequivocal, "yes." The plain terms of MCL 600.2169(1)(a) use the present tense to focus the board-certification requirement on when the expert's testimony is being offered. Because Dr. Crocker "is" presently a specialist who "is board certified" and Rock's expert isn't board certified, the plain terms of the statute preclude his expert from testifying.[50]

A. Standard of Review

"This Court reviews questions of statutory interpretation de novo." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006), citing *Halloran v Bhan*, 470 Mich 572, 576; 683 NW2d 129 (2004).

[50] This was the status when Dr. Crocker moved to exclude Dr. Viviano's testimony four days before the trial was scheduled to begin. And Dr. Viviano Dr. Viviano is still not board-certified as of this filing. See https://www.abos.org/find-a-certified-orthopaedic-surgeon.aspx, accessed July 28, 2015.

B. Principles of Statutory Interpretation

This Court has endeavored mightily to ingrain the fundamental principles of statutory interpretation in the bench and bar of this state. For well over a decade, this Court has instructed that, first and foremost, a court's "task in construing a statute, is to discern and give effect to the intent of the Legislature." *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). Accordingly, statutory analysis "**begin[s]** by examining the most reliable evidence of that intent, the language of the statute itself." *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013) (emphasis added); *Sun Valley*, 460 Mich at 236 ("This task **begins** by examining the language of the statute itself." (emphasis added)); *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000) ("Because the Legislature is presumed to understand the meaning of the language it enacts into law, statutory analysis **must begin** with the wording of the statute itself." (emphasis added)).

Court's must "consider both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.'" *Sun Valley*, 460 Mich at 237, quoting *Baley v United States*, 516 US 137 145; 116 S Ct 501; 133 L Ed 2d 472 (1995). But a statute's perceived "purpose" can't be placed ahead of its plain meaning. "The words of any statute can be effectively undermined by a sufficiently generalized statement of 'purpose' that is unmoored in the actual language of the law." *Garg v Macomb Cnty Cmty Mental Health Servs*, 472 Mich 263, 285 n 11; 696 NW2d 646 (2005). Accordingly, the language of the statute is paramount and "must be read and understood in its grammatical context, unless it is clear that something different was

intended." *Sun Valley*, 460 Mich at 237. "[E]ffect should be given to every phrase, clause, and word in the statute." *Id.* And when the statutory language is unambiguous, "the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Id.* at 236.

Time and again, this Court has "advance[d] the simple constitutional notion that [it] lacks the authority to rewrite statutory language or otherwise avoid by judicial innovation the Legislature's dictates." *Atkins v Suburban Mobility Auth for Reg Transp*, 492 Mich 707, 722 n 25; 822 NW2d 522 (2012). Enforcing statutes as they are written is the bedrock of a society governed by laws because it allows the citizenry "to know in advance what the rules of society are":

> "[I]t is to the words of the statute itself that a citizen first looks for guidance in directing his actions. This is the essence of the rule of law: to know in advance what the rules of society are. Thus, if the words of the statute are clear, the actor should be able to expect, that is, rely, that they will be carried out by all in society, including the courts. In fact, should a court confound those legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest." [*Rowland v Washtenaw Cnty Rd Comm'n*, 477 Mich 197, 216; 731 NW2d 41 (2007), quoting *Robinson*, 462 Mich at 467.]

The rule of law becomes muddled and legislated policy is lost when courts begin with a statute's purpose instead of its text. That's where the Court of Appeals' opinion went astray. The panel didn't start with the statutory text. It started in search of a policy or rationale for a rule, even though the rule was plain on the page in front of it.

C. Analysis

Unlike the Court of Appeals, this Court doubtlessly will start with the statutory text. The medical-malpractice expert-testimony statute, MCL 600.2169, requires a proposed medical-malpractice standard-of-care expert to meet certain criteria:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of care unless the person is licensed as a health care professional in this state or another state and meets the following criteria:
>
> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must ***be*** a specialist who ***is*** board certified in that specialty. [MCL 600.2169(1)(a) (emphasis added).]

The statute imposes three requirements for proposed standard-of-care experts:

- **The licensing requirement**: the proposed expert can't testify unless he "is licensed as a health care professional …."

It isn't disputed that the licensing requirement prohibits a currently unlicensed expert from testifying at trial.

- **The specialty requirement**: if the defendant is a specialist, the witness must be someone who "specializes at the time of the occurrence…."

There isn't any dispute that the specialty requirement refers to when the alleged malpractice occurred.

- **The board-certification requirement**: if the defendant is board certified, "the expert witness must be a specialist who is board certified in that specialty."

There shouldn't be any dispute that, like the licensing requirement, the board-certification requirement prohibits a non-board-certified expert from testifying at trial.

1. Under the plain language of the statute, Dr. Viviano is not qualified to testify.

The analysis is straightforward. Dr. Viviano "is licensed as a health care professional in this state," so the licensing requirement is met. Dr. Crocker and Dr. Viviano were also both specialists in orthopedic surgery at the time of the alleged occurrence of malpractice. So the specialty requirement is not at issue. But, under the board-certification requirement, "if [Dr. Crocker] is a specialist who is board certified, [Dr. Viviano] must be a specialist who is board certified in that specialty." Dr. Crocker is board certified in orthopedic surgery; Dr. Viviano is not.[51] Based on the undisputed facts, the board-certification requirement isn't met and the Court of Appeals ruling in this case was wrong.

A witness cannot give standard-of-care testimony in a medical-malpractice case unless he meets the requirements of MCL 600.2169. *Grossman v Brown*, 470 Mich 593, 599; 685 NW2d 198 (2004). Because Dr. Viviano is not board certified in the same specialty as Dr. Crocker, MCL 600.2169(1)(a) prohibits him from testifying regarding the standard of care and the trial court's ruling was correct. *Halloran*, 470 Mich at 579.

Nevertheless, Rock insisted that the board-certification requirement refers to the time of the alleged malpractice, instead of the present (as the present tense of the words "be" and "is" require). Nothing in the statute even remotely implies that the board-

[51] Appx 50a-51a, Viviano Trial Testimony, pp. 63-65; Appx 102a-103a, Order re: Expert, pp. 1-2.

certification requirement applies to the past. Yet the Court of Appeals agreed to ignore the present tense in the board-certification requirement.

The panel started in the wrong place. Instead of the most reliable evidence of legislative intent—the statutory text—the panel started with a discussion of what plaintiffs must prove in a medical malpractice case.[52] That's where it analysis first became "unmoored in the actual language of the law." *Garg*, 472 Mich at 285 n 11. There's no dispute that the standard of care is based on "the standard of medical care applicable at the time the care was provided."[53] But that proposition doesn't trump the statutory text.

When the panel reached the statutory text, it again selected the wrong starting point. It didn't start with the board-certification requirement or even the beginning of the statute. Instead, it jumped to the middle and observed that "[c]onsistent with [the panel's chosen starting point], a physician who testifies to the standard of care at issue must have possessed, on the date of the alleged malpractice, the same relevant specialty qualifications as the defendant."[54] That's true. But it's also irrelevant.

The panel observed that the specialty requirement "employs the same present-tense verbs yet plainly refers to a past time period."[55] It's true that the Legislature used the word "specializes" (the present-tense form) in the specialty requirement. But it also combined "specializes" with the past-oriented phrase "at the time of the occurrence that

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[52] Appx 111a, Court of Appeals Opinion, p. 2.
[53] *Id.*
[54] *Id.*
[55] Appx 113a, Court of Appeals Opinion, p. 4.

is the basis of the action." The Legislature knew how to distinguish between time periods. Though the specialty requirement uses the present-tense term "specializes," the addition of "at the time of the occurrence" makes it "clear that something different was intended." *Sun Valley*, 460 Mich at 237. If that same phrase was in the board-certification requirement, there wouldn't be any dispute in this case. The problem with the Court of Appeals' analysis is that the Legislature **didn't** use the phrase "at the time of the occurrence" in the board-certification requirement. Like the licensing requirement, there is no phrase modifying the present-tense verb in the board-certification requirement.

Sun Valley, which considered when a writ of restitution can issue after entry of a judgment of possession, is instructive on this point. Under MCL 600.5744, a writ of restitution "shall not be issued" until ten days after the judgment is entered. 460 Mich at 235-236. But the statute also contains a tolling provision:

> If an appeal is taken or a motion for new trial is filed before the expiration of the period during which the writ of restitution shall not be issued and if a bond to stay proceedings is filed, the period during which the writ shall not be issued shall be tolled until the disposition of the appeal or motion for new trial is final. [MCL 600.5744(5) (emphasis added).]

Sun Valley addressed whether the ten-day period was tolled if a bond wasn't filed "before the expiration of the period during which the writ of restitution shall not be issued." "It is a general rule of grammar and of statutory construction that a modifying word or clause is confined solely to the last antecedent, unless a contrary intention appears." *Id.* at 237. This Court explained that, "[i]f the statute is read in its grammatical

context, there is no ambiguity." *Id.* at 239. The time limit was only "linked to the first condition," i.e., "[i]f an appeal is taken or a motion for new trial is filed." *Id.* The second clause "contains no time limit," so "the stay bond need not be filed within ten days after the judgment for possession is entered." *Id.*

Like *Sun Valley*, this case concerns whether a clause modifies only the last antecedent. And, as in *Sun Valley*, "[i]f the statute is read in its grammatical context, there is no ambiguity." *Id.* at 239.

Here, the modifying clause is "at the time of the occurrence." The last antecedent is "specializes." So, under the grammar rule applied in *Sun Valley*, the phrase "at the time of the occurrence" is confined solely to "specializes." In other words, it only applies to the specialty requirement. It doesn't apply to the next condition, which is the board-certification requirement.

In *Sun Valley*, the two conditions were separated by a conjunction—"and." Here, the specialty requirement and the board-certification requirement are separated by a period. Like the second condition in *Sun Valley*, the board-certification requirement isn't modified by a clause in the preceding sentence that "is confined solely to" the specialty requirement. *Id.* at 237.

The Court of Appeals, however, attempted to move the phrase "at the time of the occurrence" into the board-certification requirement with the help of an ellipsis. The panel revised the statute to say that, if the defendant is board certified, "a testifying expert must 'specialize[] at the time of the occurrence that is the basis for the action in

the same specialty … [and be] board certified in that specialty.'"[56] But, of course, that isn't what the statute says. It also doesn't get around the rule "that a modifying word or clause is confined solely to the last antecedent, unless a contrary intention appears." *Id.* at 237.

Courts perform statutory interpretation, not statutory revision. It's a fundamental tenet that courts "may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.'" *Halloran*, 470 Mich at 577, quoting *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). The Court of Appeals' effort to read (or move) a phrase into the board-certification requirement that isn't there runs afoul of that tenet. It's wrong grammatically. It's wrong under the principles of statutory interpretation. And it's wrong under this Court's precedent interpreting the expert-testimony statute.

In *Halloran*, this Court made clear that the board-certification requirement is an "**additional** requirement for expert witness testimony" that applies "in spite of" the specialty requirement. *Halloran*, 470 Mich at 578 (emphasis in original). There, this Court reversed the Court of Appeals' holding that an expert needed to "share only the same subspecialty, but not the same board certification" because it was "contrary to the plain language of the statute." *Id.* at 578. The Court of Appeals erred in *Halloran* because the specialty requirement isn't linked to the board-certification requirement, as indicated "by the use of the word 'however' to begin the second sentence":

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[56] Appx 113a, Court of Appeals Opinion, p. 4, quoting MCL 600.2169(1) (edit in original).

> [T]he second sentence imposes an **additional** requirement for expert witness testimony, not an optional one. In other words, "in spite of" the specialty requirement in the first sentence, the witness must also share the same board certification as the party against whom or on whose behalf the testimony is offered. [*Id.* at 578-579 (emphasis in the original).]

This Court added that it has "invariably stated" that "the argument that enforcing the Legislature's plain language will lead to unwise policy implications is for the Legislature to review and decided, not this Court." *Id.* at 579. So the end result was simple: "Because the proposed witness in this case is not board certified in the same specialty as Bhan, MCL 600.2169(1)(a) prohibits him from testifying regarding the standard of care." *Halloran*, 470 Mich at 579.

In *Halloran*, the witness never had the same board certification as the defendant. But while its facts are different, *Halloran*'s analysis and conclusion still control. This Court applied "the plain language of the statute," rejected concerns with supposed "unwise policy implications," and stated a straightforward conclusion that (with one small edit) could serve as the holding for this case: "Because the proposed witness in this case is not board certified in the same specialty as [Dr. Crocker], MCL 600.2169(1)(a) prohibits him from testifying regarding the standard of care." *Halloran*, 470 Mich at 579.

The Court of Appeals attempted to contort *Halloran*'s statement that the board-certification requirement is an "additional requirement for expert witness testimony." According to the panel, "additional" meant that the two requirements were linked and

the board-certification requirement "adds to rather than contradicts the first."[57] But requiring a current board certification doesn't "contradict" anything. Specialization and board certification are not the same thing. A doctor can be a specialist without having a board certification. The statute requires an expert to share the same specialty at the time of the alleged malpractice and share the same board certification at the time of trial. There is no conflict there. In addition, *Halloran* stated, in no uncertain terms, that the board-certification requirement applies "'**in spite of**' the specialty requirement in the first sentence…." *Id.* at 578-579 (emphasis added). So they aren't dependent on each other. The specialty requirement demands one thing; the board-certification requirement demands another. The Court of Appeals' attempt to twist *Halloran* should be addressed and rejected.

The panel's reliance on *Woodard v Custer*, 476 Mich 545; 719 NW2d 842 (2006) is similarly strained. The section of *Woodard* that the panel cited discussed the specialty requirement and concluded that it "only requires the plaintiff's expert to match one of the defendant physician's specialties." *Id.* at 560. The reference to the board-certification requirement at the end of that discussion paraphrased the statutory text—"the plaintiff's expert must also be board certified in that specialty." *Id.* at 560. Nothing more was intended or can be extracted from that statement. *Woodard*'s observation that "the plaintiff's expert witness must also **have obtained** the same certification in order to be

[57] Appx 114a, Court of Appeals Opinion, p. 5.

qualified to testify" is also unremarkable.[58] Stating that the witness must "have obtained" the relevant board certification doesn't address or answer the question posed here. Since the proposed expert "must **be** a specialist who **is** board certified," he necessarily must have obtained that certification before he testifies. *Woodard* doesn't support the Court of Appeals' revision of the board-certification requirement because there is no dispute that the witness must "have obtained the same certification"; the issue is whether the witness must **be** board certified when he testifies. The panel overreached to say that *Woodard* addressed that issue.

2. Analysis of the preamendment version of the statute supports the plain-language construction of the current version.

Courts should not "resort to legislative history to cloud a statutory text that is clear." *Chmielewski v Xermac, Inc*, 457 Mich 593, 608; 580 NW2d 817 (1998) (citations omitted). Because the board-certification requirement isn't ambiguous, there is no need to resort to legislative history. But if this Court considers the legislative history, it will find that the legislative history confirms that the trial court's ruling was correct.

"[N]ot all legislative history is of equal value." *In re Certified Question (Kenneth Henes v Continental Biomass Ind, Inc*), 468 Mich 109, 115 n 5; 659 NW2d 597 (2003). One "legitimate" form of legislative history is a change in the statutory text. *Id.*; see *Mayor of Lansing v Mich Pub Serv Comm'n*, 470 Mich 154, 171; 680 NW2d 840 (2004) (describing "the actual change in statutory language made by the Legislature" as "the most valuable type of legislative history available to us").

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[58] Appx 115a, Court of Appeals Opinion, p. 6, quoting *Woodard*, 476 Mich at 564 (emphasis added).

Before it was amended in 1993, the expert-testimony statute did not require a proposed standard-of-care expert to hold a current medical license (it was enough that the person "**was** a physician licensed to practice medicine") and it permitted the proposed expert to be a specialist either when he testifies or when the alleged malpractice occurred:

> (1) In an action alleging medical malpractice, if the defendant is a specialist, a person shall not give expert testimony on the appropriate standard of care unless the person ***is*** or ***was*** a physician licensed to practice medicine or osteopathic medicine and surgery or a dentist licensed to practice dentistry in this or another state and … :
>
> (a) ***Specializes***, or ***specialized at the time of the occurrence which is the basis for the action***, in the same specialty or a related, relevant area of medicine or osteopathic medicine and surgery or dentistry as the specialist who is the defendant in the medical malpractice action. [MCL 600.2169(1)(a) before amendment by 1993 PA 78 (emphasis added).[59]]

The current version came about after enactment of 1993 PA 78, which,

> (1) removed the past-tense language that permitted a currently unlicensed physician to testify;
>
> (2) removed the language that allowed someone who didn't specialize at the time of the alleged malpractice to testify; and
>
> (3) inserted the board-certification requirement with present-tense language similar to the licensing requirement.

So the statutory amendments were time-frame focused. The licensing requirement was changed to require a current medical license. The specialty requirement was changed to require specialization at the time of the alleged malpractice. And the board-certification

[59] Appx 121a-122a provides the preamendment text of the statute.

requirement was added with language parroting the licensing requirement. Such language, especially in light of the Legislature's deliberate shift of verb tense in the other provisions of the statute, cannot be treated as accidental.

The Court of Appeals addressed the amendment, but its analysis only addressed the amendment of the specialty requirement. It observed that the Legislature "remove[d] an 'either/or' determination from the statute" for the specialty requirement.[60] "Under the amended statute," said the panel, "the relevant qualifications must be tested at the time of the occurrence that is the basis for the action only."[61]

The problem with the Court of Appeals analysis of the amendment is that it ignores the licensing requirement and how it was amended. The licensing requirement was also amended to remove an "'either/or' determination." The prior version allowed a person who "is or was a physician" to testify. The current version of the licensing requirement, like the board-certification requirement, is phrased in the present tense to require a current medical license. The Court of Appeals didn't even mention the similarity between the post-amendment licensing and board-certification requirements.

The Court of Appeals also assumed that when the Legislature amended the statute, it mistakenly omitted "at the time of the occurrence" from the board-certification requirement. Courts, however, are not permitted to assume that the Legislature made a mistake. Rather, "the Legislature is presumed to understand the meaning of the language it enacts into law…." *Robinson*, 462 Mich at 459; *Johnson v*

[60] Appx 114a, Court of Appeals Opinion, p. 5.
[61] Appx 114a, Court of Appeals Opinion, p. 5.

Recca, 492 Mich 169, 187; 821 NW2d 520 (2012) ("'[W]e have no right to enter the legislative field and, upon assumption of unintentional omission ..., supply what we may think might well have been incorporated.'"), quoting *Reichert v Peoples State Bank*, 265 Mich 668, 672; 252 NW 484 (1934).

The verb tense in the current version of the statute is a legislative choice. When it added the board-certification requirement, the Legislature also changed the relevant time frames for the other two requirements. The Legislature knew how to orient a provision to the past or present. The Court of Appeals erred when it presumed that the Legislature's use of present-only language for the board-certification requirement was a mistake. Its error should be reversed.

3. A statute must be construed in "its grammatical context." Doing so supports the trial court's ruling here.

This Court has faithfully respected the plain language of the Legislature's verb-tense selection. For example, *Michalski v Bar-Levav*, 463 Mich 723; 625 NW2d 754 (2001) addressed the impact of verb tense in the Handicapper Civil Rights Act (CRA). The CRA prohibits employers from discriminating against employees based on a handicap, which includes having or "being regarded as having" a physical characteristic that "substantially limits 1 or more" major life activities. MCL 37.1103(d). The plaintiff relied on evidence that the defendant believed that her physical characteristic "might substantially limit her major life activities in the future." *Michalski*, 463 Mich at 734. But that wasn't what the CRA prohibited. This Court held that the present-tense phrases—"substantially limits" and "regarded as having"—required evaluating the physical characteristic at the time of employment. *Id* at 735. The majority responded to the

dissent's criticism of its "focus on the present-tense language of the statute" by reminding that the Legislature's choice of language must prevail: "The Legislature can and may rewrite the statute, but we will not do so." *Id* at 734, n 14. Accordingly, this Court rejected the plaintiff's (and the dissent's) attempt to assign a future-tense interpretation to the Legislature's words.[62]

Likewise, in *Chmielewski*, 457 Mich 593, the dissent criticized that the majority's interpretation of a present-tense section of the CRA was a "strained plain-language argument." *Id.* at 610 n 20. The majority defended its analysis by stressing that "[s]urely, one could not seriously characterize as 'strained' an analysis that honors the Legislature's choice of the present tense."

In *Girard v Wagenmaker*, 437 Mich 231; 470 NW2d 373 (1991), this Court considered the Legislature's choice of the present-perfect tense versus the present tense in the Paternity Act. The Paternity Act defined "child born out of wedlock" to include "a child which the court **has determined** to be a child born during a marriage but not the issue of that marriage." MCL 722.711(a) (emphasis added). Relying on the present-perfect tense, this Court held that the statute required "a prior court determination that a child is born out of wedlock." 437 Mich at 242. The plaintiff's interpretation would

[62] *Michalski* held that the present-tense language referred to the time of the plaintiff's employment, instead of the time of trial. But statutes that prohibit discrimination against employees clearly apply to the timeframe of employment. The expert-testimony statute concerns trial procedure and applies to the timeframe of when a proposed expert would be called to give testimony. See MCL 600.2169(1) ("[A] person shall not give expert testimony on the appropriate standard of care unless ….").

have "read 'has determined' to mean 'may determine,'" which the majority equated as calling for "an alteration of the plain meaning of the words." *Id.*

In *Deschaine v St Germain*, 256 Mich App 665; 671 NW2d 79 (2003), the plaintiff contested the temporal meaning of "permit" in MCL 700.5204(2)(b), a portion of a guardianship statute. The former version of the statute contained the phrase "have permitted." This Court emphasized that the "distinction in verb tense represents a difference [that results] in a finding that … the current version of the statute uses the present tense of 'permit' only." The plain meaning of the statute required that permission must be "currently occurring – which would be shown by the child's actual presence in the care of another – when the guardianship issue arises." *Id.* at 666; see also *People v Williams*, 294 Mich App 461, 476; 811 NW2d 88 (2011) lv den 491 Mich 854 (2012) (holding that the present-perfect tense—"has become liable to serve"—meant that a sentence could only be consecutive to a sentence that was imposed in the past); *People v Campbell*, 39 Mich App 433; 198 NW2d 7 (1972) (emphasizing the past tense meaning of "forfeited" in the vehicle forfeiture statute, MCL 335.156).

Rock's argument principally relied on the plurality opinion in *Shinholster v Annapolis Hosp*, 471 Mich 540; 685 NW2d 275 (2004). There, the issue was whether the higher noneconomic-damages cap in MCL 600.1483, which requires proof that a plaintiff "has permanently impaired cognitive capacity," applied when the plaintiff's decedent was dead. The plurality held that the higher cap applied. The lead opinion

rejected the defendants' reliance on the Legislature's use of the present tense.[63] But it also addressed an entirely different context. The higher cap applies if a plaintiff has a "**permanently** impaired cognitive capacity." A permanent impairment is one that is "expected to last forever." *Young v Nandi*, 276 Mich App 67, 80; 740 NW2d 508 (2007), vacated in part on other grounds, lv den in part 482 Mich 1007 (2008). Once a plaintiff is deemed to have a "permanent" condition (which the plaintiff in *Shinholster* had before he died), the question of whether he or she "has" it is settled forever—one **always** "has" a "permanent" condition.

Board certification is a more transient status. It isn't permanent or "expected to last forever." Once certified, a board-certified specialist must take steps to retain that status—steps Dr. Viviano undisputedly didn't or couldn't take.

Courts closely scrutinize verb tense to determine what the Legislature intended. The Legislature intentionally included **different** temporal properties in the second sentence of MCL 600.2169(1)(a). The Legislature used the present tense verbs "be" and "is" in that sentence. "'Present tense' means 'being, existing, or occurring at this time or now ….'" *Deschaine*, 256 Mich App at 672, citing Random House Webster's College Dictionary (2001). The present tense verbs in the second sentence of MCL 600.2169(1)(a) require that a proposed standard-of-care expert must be **currently** board certified if the

[63] Despite Rock characterizing the lead opinion as "the Court's decision," only two justices accepted the rationale that Rock relies on, while two other justices concurred only in the result. As a result, the lead opinion is non-binding and "is not authority beyond the immediate parties." *Negri v Slotkin*, 397 Mich 105, 109; 244 NW2d 98 (1976).

defendant against whom he or she proposes to testify is also board certified. There is simply no dispute that Dr. Viviano is not.

The gist of Rock's argument and the Court of Appeals analysis is that the Legislature's use of the present tense was a mistake that can be ignored. The Legislature explicitly wrote the specialty requirement in the past tense, but, they say, it forgot to include past-tense language in the board-certification requirement. As the lead opinion in *Shinholster* noted, "had the Legislature truly intended" to do what Rock and the Court of Appeals propose, "it knew how to make that intent specific." 471 Mich at 566. Courts don't have the authority to supply what the Legislature omitted. *Robinson*, 462 Mich at 459; *Johnson*, 492 Mich at 187.

4. Arguments concerning "absurd results" are insufficient to avoid enforcement of an unambiguous statute. The Court of Appeals also incorrectly asserts that a "confounding consequences" will be obtained by enforcing MCL 600.2169(1)(a) as written.

Rock urged and the Court of Appeals concluded that interpreting the expert-testimony statute as written will lead to "confounding consequences" or "absurd results." But, in Michigan, supposed "absurd results" do not permit courts to ignore or refuse to apply an unambiguous statute. *People v McIntire*, 461 Mich 147, 159; 599 NW2d 102 (1999) ("[I]n our democracy, a legislature is free to make inefficacious or even unwise policy choices. The correction of these policy choices is not a judicial function as long as the legislative choices do not offend the constitution."); *Kimmelman v Heather Downs Mgt Ltd*, 278 Mich App 569, 574; 753 NW2d 265, lv den 482 Mich 989 (2008) ("[T]his Court must follow the unambiguous language of a statute, even if doing so

would produce an absurd or irrational result."). Though this Court's members "have differences concerning whether the 'absurd results' doctrine exists in Michigan," *Johnson*, 492 Mich at 192, those who subscribe to it view it as a narrowly-circumscribed doctrine. It "'must not be invoked whenever a court is merely in disagreement, however strongly felt, with the policy judgments of the Legislature'" and it only applies "'if it is quite impossible that [the Legislature] could have intended the result ….'" *Id.* at 193, quoting *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 80; 718 NW2d 784 (2006) (Markman, J., concurring) and *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289, 346; 791 NW2d 897 (2010) (Markman, J., dissenting).

If the supposed "confounding consequences" are considered, a closer look shows that they are neither confounding nor absurd. In fact, there are some scenarios that the Legislature likely intended to avoid and are only avoided if the statute is enforced as written. So the Legislature is not as "unwise," nor the results so "absurd" or "confounding," as the Court of Appeals portrayed it.

The panel's primary concern was that if a defendant lost his board-certification before trial—whether through retirement, death, or expiration—the plain language of the board-certification requirement would "permit testimony from an expert who had

never been board certified."[64] While true, the panel missed the fact that the expert-testimony statute isn't the only standard for an expert's qualification. Experts who meet the statutory standards can be disqualified for other reasons because the expert-testimony statute "does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section." MCL 600.2169(3). A proposed expert's lack of board certification when the alleged malpractice occurred may be a basis to exclude his testimony under MRE 702. So the panel's "confoundment" that a plain-language interpretation of the board-certification requirement would "permit testimony" is overstated.

The panel was also concerned about allowing testimony from an expert who became board certified after the alleged malpractice. Again, the expert's lack of board certification when the alleged malpractice occurred may disqualify him under MRE 702. But the specialty requirement also addresses the panel's concern. The requirement that the expert share the same specialty "at the time of the occurrence," ensures that the expert will be familiar with the applicable standard of care when the alleged malpractice occurred. So, again, the panel's hypotheticals are not a reason to disregard the plain language of the statute.

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[64] Appx 116a, Court of Appeals Opinion, p. 7. Rock posited a scenario in which the defendant changes specialties after the alleged malpractice, Rock Court of Appeals Brief, p. 9, but that misunderstands (or ignores) the specialty requirement. In Rock's scenario, though the defendant switches specialties without losing his board certification, see, e.g., *Reeves v Carson City Hosp (On Remand)*, 274 Mich App 622; 736 NW2d 284 (2007), the switch doesn't change his specialty at the time of the alleged malpractice, so it doesn't change the application of MCL 600.2169(1)(a).

The panel's "confounding consequences" share the same flawed premise. They assume that there is something wrong about a witness testifying against a doctor who was board certified when the alleged malpractice occurred if the witness wasn't board certified at that time. But the standard of care depends on whether the defendant was a specialist, not whether he was board certified. The Legislature divided the standard of care between "general practitioners" and "specialists." MCL 600.2912a; see *Cox v Bd of Hosp Mgrs*, 467 Mich 1, 17 n17; 651 NW2d 356 (2002) (explaining that "[t]he statutory standards … are often referred to as the 'general' or 'local' standard of care for general practitioners and the 'national' standard of care for specialists."). The standard of care doesn't change for specialists who are also board certified. MCL 600.2912a(1)(b). And the specialty requirement under MCL 600.2169(1)(a) is expressly oriented and locked into the specialty that the defendant practiced "at the time of the occurrence that is the basis for the action." So whether the defendant "complied with the standard of care as it existed" "when he acted"[65] doesn't hinge on whether he was board certified in his specialty. The Court of Appeals panel stated that "a physician's conduct and decision-making must be judged against the standard of care that applied when he acted."[66] That will happen under the specialty requirement in MCL 600.2169(1)(a) and the "national" standard of care in MCL 600.2912a(1)(b). The panel lost sight of the fact that board certification has no bearing on the standard of care and the board-certification requirement concerns who can give the testimony, not the substance of the testimony.

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[65] Appx 111a, Court of Appeals Opinion, p. 2.
[66] *Id.*

In short, both board certified and non-board certified specialists are held to the same standard of care, MCL 600.2912a(1)(b), so the panel's "confounding consequences" are based on an irrelevancy.

The point that the panel missed and that its interpretation would negate was this: The Legislature may have reasonably determined that where, as here, defendant physicians make the effort to obtain and maintain their board-certification credentials, they should only have their professional skill and expertise called into question by someone who has made the same effort to maintain his or her own board certification. Obtaining certification is not a simple matter of mailing in a fee or an application. A board-certified orthopedic physician wishing to obtain or maintain board certification must complete a significant amount of continuing medical education, undergo a peer and credential review, and take a written examination.[67] And many, if not all, specialty boards retain the right to revoke board certification under a variety of circumstances. For example, the American Boards of Surgery and Internal Medicine retain the right to revoke certification when a physician has his or her license revoked, makes misrepresentations on his or her application for certification, fails to maintain an acceptable level of competence, or for failure to maintain ethical, professional, or moral

[67] American Board of Orthopaedic Surgery, https://www.abos.org/certification/board-certification.aspx, accessed July 28, 2015.

standards.[68] So the Legislature may have concluded that physicians who take the care to obtain and maintain their continuing-medical education, subject themselves to rigid peer review, and undergo the trouble of retaking certification examinations on a schedule deserve to have only those potential experts who have done the same opine on whether they complied with the standard of care. There is nothing absurd about that policy, nor how it's effectuated under the board-certification requirement.

Notably, the panel's proposed interpretation of the board-certification requirement would have its own "confounding consequence:" A physician who had his or her board certification revoked for a moral or ethical violation, or for making misrepresentations on his or her application for certification, or for a variety of other misconduct,[69] would be "qualified" to offer standard-of-care testimony against a board-certified physician. If absurdity was relevant, the panel's interpretation permits the more "absurd" result.

This Court doesn't need to delve into the "degrees of absurdity" that the panel's opinion invites. The statute must be enforced as written, even if it's considered "inefficacious" or "unwise." *McIntire*, 461 Mich at 159. And the panel's "confounding consequences" don't rise to the level of making it "quite impossible that [the Legislature] could have intended the result" in this case or the scenarios that the panel

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[68] American Board of Surgery policies regarding revocation, http://www.absurgery.org/default.jsp?policyrevocation, accessed July 28, 2015; American Board of Internal Medicine general policies, http://www.abim.org/certification/policies/general-policies-requirements.aspx#sanctions-appeals, accessed July 28, 2015.

[69] Yet also managed to retain his or her medical license, another qualification for being a standard-of-care witness. MCL 600.2169(1).

suggested. *Johnson*, 492 Mich at 193; *Halloran*, 470 Mich at 579 ("[T]he argument that enforcing the Legislature's plain language will lead to unwise policy implications is for the Legislature to review and decide, not this Court.").

D. Conclusion

The problem with the Court of Appeals' opinion is its method. The panel started out rationalizing a rule that it thought would make the most sense. Once it had a rule in mind, it went to the statutory text in search of a construction that supported its predetermined rule. But, as this Court has admonished, proper statutory interpretation starts with the statutory text. The panel's opinion in this case is the poster-child for statutory revision, not statutory interpretation. Because the Court of Appeals erroneously reversed the trial court's ruling and misconstrued the expert-testimony statute in a published opinion, this Court should reverse the Court of Appeals and hold that, under the plain terms of MCL 600.2169(1)(a), the trial court correctly excluded Dr. Viviano's testimony because Dr. Crocker is board certified and Dr. Viviano is not board certified.

Relief Requested

Defendants-appellants K. Thomas Crocker, D.O., and K. Thomas Crocker, D.O., P.C., ask this Court to reverse the Court of Appeals on both of the issues that it granted leave to consider.

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